In the

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a corporation,
Bankrupt

THOMAS CARSTENS and STACIE C. CARSTENS, his wife, *Appellants*

vs.

JOHN L. McLEAN, as Trustee in Bankruptcy of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a corporation, Bankrupt,
Appellee

REPLY BRIEF OF APPELLANTS

KERR, McCORD & IVEY
WM. Z. KERR
ATTORNEYS FOR APPELLANTS
1309 Hoge Building, Seattle, Washington

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MOTION TO DISMISS APPEAL

The present appeal is from an order which rejects a debt or claim of over $500 within meaning of section 25a, Bankruptcy Act of 1898, as amended. The cases cited by appellee are not in point. The only decision squarely in point that we have

been able to find is a recent case of *In re J. Menist Co.*, 289 Fed. 229. This is a decision of the Circuit Court of Appeals of the Second Circuit later than two cases cited by appellee on page 4 of his brief of the same circuit. In this case the National Surety Company failed to file its claim within the year allowed for filing claims and the claim "was not accepted on the ground that it was not filed in time. The Surety Company thereupon applied to the district for permission to file its claim and its application was denied. It then petitioned to revise and also appealed." The petitioner attempted to evade section 57n of the Bankruptcy Act by seeking to be subrogated to a claim of the United States government. Judge Rogers said:

"Before we proceed to a consideration of that question (the right of subrogation) we find it necessary to say that as the case has been brought here by petition to revise and appeal we must dismiss the petition to revise. Under Bankruptcy Act, section 25a an appeal is the proper method to bring here a judgment rejecting a claim. The petition to revise must therefore be dismissed as improperly brought. In dismissing it we can not refrain from condemning the practice of bringing both the petition to revise and an appeal in a case like this in respect of which there can be no possible doubt as to the proper remedy under the act. There are, of course, doubtful cases in which counsel may be

justified in resorting to both methods of bringing a case into this court leaving it to the court to determine which of the two methods was the one the act required to be used but this case is not of that class and there can be no excuse for the loose and careless practice of resorting to both remedies where it is perfectly plain which method under the act is the one which the party must employ."

Practically all of the cases where the Circuit Courts have considered the propriety of filing amended claims the matter has been brought to the Circuit Court by appeal and no question has been made of the propriety of the practice.

In re Kessler, 184 Fed. 51.

Bennett v. American Indemnity Co., 159 Fed. 624.

In re Jones Dry Goods Co., 223 Fed. 318.

In re Central Grain Co., 200 Fed. 229 (Ninth Circuit).

In re Ellis, 252 Fed. 483.

In the present case the facts are stipulated by the parties and are not in dispute so that in any event there is nothing but a question of law involved. If appellants have been in error in relying upon appeal alone, the court should consider the appeal as a petition to revise.

In re Williams Estate, 156 Fed. 934 (Ninth Circuit).

In re Russell, 247 Fed. 95.

Collier Bankruptcy, (12th ed.) p. 579.

The Circuit Court of the second circuit has recently even permitted the construction of an erroneous appeal as a petition to revise.

In re Rasmussen, 287 Fed. 860.

ARGUMENT ON MERITS

Argument of respondent seems to resolve itself into the proposition that appellants' letter of August 28, 1920, was not intended to be filed as a claim. The only authorities cited to support this proposition are *In re Thompson*, 223 Fed. 167; *In re McCallum*, 127 Fed. 768 and *In re Mercur*, 122 Fed. 384.

In re Mercur does not appear to involve an amendment to a claim.

In re McCallum a claim was made on one note. Attempt was made to amend this claim by adding an entirely new indebtedness on another note. The amended claim in the present instance is the identical debt claimed in the letter of August 28th.

In re Thompson does not hold that it is necessary that the letter sent to the trustee had to be sent with intention that it be filed as a claim but simply holds that the letter must evidence an intention to hold the estate liable. As pointed out in our opening brief, page 21 *seq.*, the letter of August 28th sufficiently evidences an intention to assert a demand against the estate irrespective of the purpose of the appellants in addressing the letter to the trustees.

On pages 13 and 14 of appellee's brief, they suggest that in the cases relied on by the appellants, it was admitted that the claims were justly due. They suggest that the 1919 taxes in the present case, includes a

(a) Local assessment,

(b) That the trustee should have a credit for a deposit made as security on the lease, and

(c) A credit for an overpayment by mistake for local improvement assessments for 1917 and 1918.

The portion of the 1919 tax for commercial waterway assessment (paragraph 3, Original Petition, Trans. p. 3), collectible under section 9754, Remington's Compiled Statutes, 1922, is made a

part of the general taxes so as to require the lessee to pay the assessments under the terms of the lease providing that the lessee should pay "the annual taxes on the property." In part the section provides:

"All assessments shall be levied from time to time by the Board of Commissioners by written notice to be addressed to and served on the County Assessor of the county, which notice shall be so served on the County Assessor on or before the first day of November of each year, or as soon thereafter as practicable, and such assessments shall be levied against and apportioned to the lands in such district benefited by said improvements in proportion to the maximum benefits originally determined by the judgment of the court and such assessments shall fall due during the then ensuing calendar year at the time of the falling due of general taxes, and the amount so designated shall be added by the county assessor to the general taxes of each person or corporation, and to the general taxes against each lot or tract of land or other property, according to such notice, and the several amounts thereof shall be placed upon the general tax-rolls in the office of the county assessor and shall be deemed for all purposes a part of the general taxes, and shall constitute liens against each such lot or tract of land of equal rank with state, county and city taxes and shall have the same priority over all other liens as state, county and city taxes have, and shall be subject to the same interest and penalties in case of delinquency, certificates of delinquency foreclosure or other pro-

ceedings leading up to final payment, enforcement and collection, such assessments shall be deemed a part of the general taxes as aforesaid."

In view of the statute it seems to us that the provision in the lease requiring payment of the annual taxes would clearly require the payment of a portion of the taxes made up by the waterway assessment.

The record is silent as to any deposit having been made for security of performance of the lease by the tenant but the trustee has refused to accept the lease as an asset of the estate and the lease therefore still belongs to the bankrupt.

It would certainly be a strange situation that would permit the trustee to take from the creditor a security held for performance of the contract and permit the bankrupt to continue to hold the creditors' land as a tenant.

The trustee can hardly claim that the waterway assessment paid by the bankrupt in 1917 and 1918 could be credited against the taxes, since, as we have pointed out, the assessment is for "all purposes" to be considered a part of the general taxes. The fact that the tenant paid the taxes during those two years is evidence of a construction

of the contract in accordance with the provision of the statute.

We therefore insist that there is not even a *prima facie* showing that the claim of the appellants is not justly due and owing.

Right to Amend Sixty Days After Liquidation of Claim

The first three cases cited by the appellant on page 39 of their brief are erroneous citations and do not involve section 57n of the act. In lieu thereof we would cite *In re Salvator Brewing Co.*, 193 Fed. 989; *In re Faulkner*, 161 Fed. 900.

We also apologize for the erroneous quotation from the *Otis* case on page 9 of our brief.

We respectfully submit that the appellants are entitled to redress on this appeal.

KERR, McCORD & IVEY,
WM. Z. KERR,
Attorneys for Appellants.